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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-419

AUTOMOTIVE CHAUFFEURS, PARTS AND GARAGE EMPLOYEES, LOCAL UNION 926, et al.,
Petitioners,

v.

NAPA PITTSBURGH, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Third Circuit

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Petitioners Automotive Chauffeurs, Parts & Garage Employees, Local Union No. 926, Michael Gardner, Gerald Lee, Raymond Salerno, and William Dorsey respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 8, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit and the dissenting opinions, not yet officially reported, appear unofficially at 87 LRRM 2044. They are ap-

pended at App. A, pp. A-1-A-29, *infra*. The opinion of the United States District Court for the Western District of Pennsylvania appears at 363 F. Supp. 54. It is appended at App. B, pp. A-30-A-38, *infra*.

JURISDICTION

The judgment on rehearing in banc of the United States Court of Appeals for the Third Circuit was entered on August 8, 1974. It is appended at App. C, p. A-39, *infra*. This Court has jurisdiction under 28 USC § 1254 (1).

QUESTION PRESENTED

Does a court of the United States have jurisdiction, notwithstanding § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, to restrain a labor organization and its members from conduct protected therein where:

(a) the protected activity is in furtherance of a labor dispute which is not arbitrable under the collective bargaining agreement and only the contractual right of employees to engage in protected activity is claimed to be arbitrable by the party seeking the injunction; and

(b) the language in the collective bargaining agreement expressly excepts from its no-strike provisions the right to engage in the type of protected activity sought to be enjoined?[1]

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[1] Petitions for certiorari in *Local 391, Int. Bro. of Teamsters v. Pilot Freight Carriers, Inc.*, No. 74-48, and *Local 1426, Int. Longshoremen's Assn. v. Wilmington Shipping Co.*, No. ——, present an essentially similar question and are already pending before this Court.

STATUTES INVOLVED

This case involves § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, as well as § 301(a) of the Labor-Management Relations Act of 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185(a). These provisions are appended at App. D, p. A-40, *infra.*

STATEMENT OF THE CASE

1. Federal Jurisdiction

This case arose when NAPA Pittsburgh, Inc. (NPI), invoked the jurisdiction of the district court under § 301(a), LMRA, to secure injunctive relief against a work stoppage under the "narrow" exception to the anti-injunction provisions of the Norris-LaGuardia Act carved out in *The Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 253 (1970).

2. The Parties

Respondent NPI, directly or through its Superior Motor Parts Division, operated five automotive parts warehousing and sales branches in Pittsburgh, Pennsylvania and vicinity, including premises on Hamilton Avenue in Pittsburgh (A-30). Petitioner Automobile Chauffeurs, Parts and Garage Employees Local Union 926 (Local 926) was party to a collective bargaining agreement with NPI covering employees at all five locations (A-32). No provision of this agreement obligated NPI or its corporate affiliates to recognize any union elsewhere in the enterprise. NPI's wholly-owned subsidiary, NAPA Altoona, Inc. (NAI), engaged in the same business at a facility near Altoona, Pennsylvania,[2] but had no collective bargaining agreement covering its warehousemen and truckdrivers (A-32).

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[2] This was the assertion of NPI's counsel to the district court. Appendix, p. 7a.

3. The Factual Background

NAI's refusal to recognize Teamsters, Chauffeurs & Helpers Local 110 (Local 110) as the exclusive bargaining agent of its warehousemen and truckdrivers at Altoona, while proceedings for a representation election before the National Labor Relations Board dragged on, provoked the workers to strike and picket in support of Local 110's demand for recognition (A-3, A-32). To promote these efforts, Local 110 extended its picketing to NPI's Hamilton Avenue premises (A-3). As a result, members of Local 926 refused to cross the picket line and work (A-32).

Although the four-step grievance arbitration procedure in the collective bargaining agreement between Local 926 and NPI was open to "any and all grievances, complaints or disputes arising between the Employer and the Union or any employee represented by the Union," the no-strike language applied only to work stoppages during the "pendency" of grievance proceedings (A-31). Article XIII of that agreement expressly provided:

> "It shall not be a violation of this Agreement . . . in the event an employee refuses to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket lines . . . at the Employer's place or places of business." (A-31)

The work stoppage by members of Local 926 was caused only by the presence of Local 110's picket line, not because of any grievance, complaint or dispute between NPI and Local 926 or any employee it represents (A-11). Local 926 advised its members that its agreement permitted them to respect the picket line established by the sister local and to cease work (A-32).

4. The Proceedings Below

NPI sought to enjoin the work stoppage, asserting that it was caused by Local 926's "support of Local 110's demand

for recognition at Altoona" and that the work stoppage was in "direct violation" of Local 926's agreement to submit all disputes to binding arbitration.[3] The question to be arbitrated, NPI urged, was not the dispute that gave rise to the picketing and work stoppage at Pittsburgh but the legality of the work stoppage itself, *i.e.*, whether Local 110's picketing at that location was, as NPI claimed, secondary and therefore unprotected by Article XIII of the agreement (A-4).

The district court's decision and order directed Local 926 to "require" its members "to return to work immediately and cease their work stoppage in honoring the picket line of Local 110" (A-38) and ordered arbitration of what it termed the "underlying dispute in this case, that is the right of the Local Union to refuse to cross the picket line" (A-36). However, the court refused to decide whether the work stoppage violated the collective bargaining agreement, reasoning that the "merits" of that claim were for the arbitrator to decide (A-36). The Fifth Circuit's *Amstar*[4] decision was distinguishable, he ruled, because its rationale directed a different result where, as here, the agreement contained a "specific provision for picket lines" (A-36).

On appeal, following a hearing before a panel of the court, the case was submitted for rehearing in banc. In a six to three decision filed August 8, 1974 the Court of Appeals affirmed the judgment of the district court.[5]

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[3] Appendix, pp. 4a-5a.

[4] *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen*, 468 F. 2d 1372 (5th Cir. 1972).

[5] The Court of Appeals unanimously overruled NPI's motion to dismiss the appeal as moot because Local 110 had withdrawn its picket line at Hamilton Avenue. Local 926's right to indemnification on the injunction bond, if it prevailed on the merits, was, the court held, sufficient to present a viable controversy (A-2, n. 1).

The majority[6] read *Boys Markets* to hold "in essence" that injunctive relief is permitted whenever the court, applying the presumption of arbitrability, would direct arbitration of the legality of the work stoppage itself (A-5). Thus it, too, declined to decide whether the work stoppage violated Local 926's agreement, reasoning that it was for the arbitrator to determine whether the picket line was primary or secondary (A-6). *Amstar* and similar cases were distinguished on the ground that those contracts lacked provisions "restricting the union's right to honor picket lines of other labor organizations" (A-6).

Judge Hunter's dissent, joined by Chief Judge Seitz and approved by Judge Adams,[7] "comes down to" a disagreement as to the meaning of *Boys Markets* (A-9). On policy grounds Judge Hunter distinguished between the impact of work stoppages to force employer capitulation on an arbitrable grievance as in *Boys Markets* and those in which the underlying dispute is not subject to arbitration. The former thwart federal labor policies favoring arbitration in important ways that the latter do not. Moreover, to permit injunctive relief in the latter cases would work to inhibit the arbitration process since, having secured early judicial restraint without reaching the merits, an employer would have little to gain from the award and thus strong incentive to obstruct and delay the arbitration process. On the other hand, a union with possible damage liability in mind, would not be similarly tempted.

Judge Hunter concluded that *Boys Markets* permits a no-strike injunction "only when an arbitrable issue is itself the 'underlying cause' of the srike." First, because this Court limited its

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[6] Circuit Judge Weis, joined by Judges Van Dusen, Aldisert, Gibbons, Rosenn and Garth.

[7] In addition, because of the "historical backdrop", Judge Adams reasoned that doubtful cases near the perimeters of the narrow *Boys Markets* exception should be resolved in favor of the applicability of the Norris-LaGuardia Act (A-28).

holding to strike "over" arbitrable disputes. Second, because this Court termed the *Boys Markets* exception "narrow" and the decision below would allow injunctions indiscriminately whenever an employer could concoct an arbitrable claim that the work stoppage might violate some express or implied provision of the agreement. And third, because the interests that warranted relief in *Boys Markets* were not present in the instant matter. *Amstar*, he noted, furnishes "direct support" for this conclusion, and cannot "sensibly" be distinguished on the ground that the picket line clause that Local 926 negotiated actually "restricted" its right to engage in work stoppages (A-21, n. 14). Finally, Judge Hunter concluded from his analysis of this Court's recent decision in *Gateway Coal*,[8] that nothing therein suggested abandonment of the "underlying cause" requirement of *Boys Markets* (A-21-A-24).

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[8] *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts in Principle With This Court's Holding in *The Boys Markets v. Retail Clerks Union*, 398 US 235.

In *The Boys Markets v. Retail Clerks Union Local 770*, 398 US 235 (1970) this Court struck a principled accommodation of the policies of § 301 of the LMRA and those of § 4 of the Norris-LaGuardia Act so as not to "undermine the vitality" of the latter, 398 US at 253. Norris-LaGuardia, of course, was enacted primarily to protect "working men in the exercise of organized economic power."[9] The decision below, however, not only saps § 4 of vitality, it would deny workers their contractually secured rights to exercise economic self-help. Under its sweeping holding, a court must issue the no-strike injunction, resolving "any doubt" against worker exercise of organized economic power during the life of a labor agreement that treats with the subject and provides for arbitration of employer complaints (A-5). That result as well as the reasoning applied to reach it conflict irreconcilably with the controlling principles set forth by this Court in *Boys Markets*.

For *Boys Markets* permits injunctive relief only if the parties are contractually bound to arbitrate the underlying dispute, ***i.e.***, the grievance dispute concerning which the strike was called. This was the language chosen by Mr. Justice Brennan to describe the holding in *Sinclair Refining Co. v. Atkinson*, 370 US 195 (1962) that was re-examined,[10] and this was the unmistakable import of the *Boys Markets* accommodation itself:

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[9] *Bro. of Railroad Trainmen v. Chicago River & Ind. R. Co.*, 353 U.S. 30, 40 (1957).

[10] "[W]e re-examine the holding . . . that the anti-injunction provisions of the Norris-LaGuardia Act preclude . . . enjoining a strike in breach of a no-strike obligation . . . even though that agree-

> "When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike." 398 US at 254 (emphasis in original).

The strike must be "over" an arbitrable grievance, this Court reasoned, to avoid depriving the union of "any practicable means of pressing its claim" and thus give effect to Norris-LaGuardia's "central purpose" of fostering the "growth and viability" of labor organizations.[11]

Indeed, the dissenting opinion by Mr. Justice Brennan in *Sinclair*, expressly adopted and approved in full by this Court in *Boys Markets*,[12] is clear that, to effectuate Norris-LaGuardia's "core purpose", an injunction may issue only if the strike is caused by an arbitrable dispute. The employer's "specifically enforceable" duty to resolve the underlying worker complaint through arbitration, he reasoned, eliminated "one of the problems to which Norris-LaGuardia was chiefly addressed"; namely, that

> "the injunction strips labor of its primary weapon without substituting any reasonable alternative." 370 US at 218.

Thus "strikes over grievances which have been routed to arbitration" threaten to "sabotage" effective enforcement of arbi-

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ment contains provisions . . . for binding arbitration of the grievance dispute *concerning which the strike was called*." 398 U.S. at 237-238 (emphasis supplied).

[11] 398 U.S. at 252-253. "[W]here the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose." (n. 22).

[12] 398 U.S. at 249, 254.

tration agreements, *i.e.*, force employer capitulation to "effectively 'defeat the jurisdiction' of the arbitrator" over the underlying dispute.[13] But there is "no general federal anti-strike policy" and strikes which, "while they are breaches of private contracts do not threaten any additional public policy, in such cases, the anti-injunction policy of Norris-LaGuardia should prevail."[14]

Accordingly, where the only dispute which is arbitrable is the legality of the work stoppage itself, the injunction has stripped employees of that "reasonable alternative" to use of their primary weapon which is crucial to the Norris-LaGuardia component of the *Boys Markets* accommodation, although the work stoppage threatens no sabotage of the arbitral process.[15]

Furthermore, if any doubt must be resolved in favor of a claim that an arbitrator might hold the work stoppage to breach some express or implied term of the agreement, then a gaping hole has been opened in the Norris-LaGuardia Act that would allow federal court injunctions against many contractually *permitted* worker self-help measures. To check such mischief, *Gateway Coal*, following *Boys Markets*, teaches that the *court* must decide whether the union breached a "contractual duty not to strike" before issuing the injunction. 38 L. Ed. 2d at 593. Yet the decision below left that crucial issue to the arbitrator. Failure to adhere to the "underyling cause" requirement of *Boys*

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[13] 370 U.S. at 219, 224-225.

[14] 370 U.S. at 225.

[15] St. Antoine, "Interventionism, Laissez-Faire and Stare Decisis: The Labor Decisions of the Supreme Court, Oct. Term 1969", *Sect. of Labor Relations Law, American Bar Assoc.*, 1970 Proc., Vol. 1, pp. 166: "[It is Justice Brennan's thesis that an injunction against a strike does not undercut the policy of Norris-LaGuardia so long as the union is not *left defenseless*, but instead can invoke binding arbitration *as an alternative* to striking" (emphasis supplied).

Markets has led the Third Circuit to these direct and fundamental conflicts with controlling principles established by this Court.

II. The Decision Below Presents an Important Statutory Question on Which the Courts of Appeal Are in Direct Conflict.

The decision of the Third Circuit in this case is in direct conflict with the decision of the Fifth Circuit in *Amstar Corp. v. Amalgamated Meat Cutters and Butcher Workmen*, 468 F. 2d 1372 (5th Cir., 1972). *Amstar* holds that work stoppages resulting from extension of picket lines by a striking union to another plant where workers are covered by a collective agreement containing unlimited no-strike and broad arbitration provisions cannot be enjoined. The Fifth Circuit construes *Boys Markets* to permit injunctive relief "only if the underlying dispute 'over' which the strike has been called is arbitrable" and not when "the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the member-employees honoring the [other union's] picket line," 468 F. 2d at 1373. In this case the Third Circuit held directly to the contrary.

The majority below sought to distinguish *Amstar* on the ground that Amstar's collective agreement contained no provisions "restricting" the union's right to honor picket lines. However, that agreement prohibited any "stoppage" authorized or encouraged by the union and the district court found that these terms "more than sufficiently treat the subject matter of this dispute."[16] This Court holds that "no cessation of work" language of this type, absent an express provision to the contrary, not merely restricts but interdicts the refusal to cross picket

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[16] *Amstar Corp. v. Amalgamated Meat Cutters, etc.*, 337 F. Supp. 810, 815 (E.D. La. 1972).

lines.[17] That NPI's agreement contains picket line provisions limited only as required by § 8(e) of the LMRA, 73 Stat. 541, 29 U.S.C. § 158(e),[18] is, as the dissenters below correctly observed, no sensible basis for distinguishing *Amstar*. Indeed, the Fourth Circuit makes no such attempt. There, sympathetic work stoppages may be enjoined whether, as in *Monongahela*,[19] the agreement is silent as to picket lines but contains broad no-strike provisions or, as in *Pilot*,[20] it contains language which expressly permits refusals to cross primary picket lines.[21] Neither the Third nor the Fourth Circuits holdings, then, can be reconciled with the *Amstar* holding, on the same essential facts, that Norris-LaGuardia bars injunctive relief when the only arbitrable dispute is the legality of the work stoppage rather than its underlying cause.[22]

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[17] *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 79-80 (1953).

[18] *Drivers, etc. Local 695 v. NLRB*, 361 F. 2d 547, 550-551 (D.C. Cir., 1966); *Truckdrivers, etc. Local 413 v. NLRB*, 334 F. 2d 539, 542-543 (D.C. Cir., 1964).

[19] *Monongahela Power Co. v. IBEW*, 484 F.2d 1209 (4th Cir. 1973).

[20] *Pilot Freight Carriers, Inc. v. Int. Bro. of Teamsters*, 497 F.2d 311 (4th Cir. 1974)..

[21] District courts of the Fifth Circuit and elsewhere have also refused to distinguish *Amstar* in cases where the collective agreements privileged individual employees to refuse to cross a primary picket line. *The Carnation Company v. Sales Drivers, etc. Local No. 949*, — F. Supp. —, 84 LRRM 5012 (S.D. Tex., 1974); *Pilot Freight Carriers, Inc. v. Local 560, Int. Bro. of Teamsters*, 373 F. Supp. 13 (D.N.J., 1974). Contrary to the Third and Fourth Circuits, the Second Circuit gives a hospitable reading to contractual reservations of the right to strike, barring *Boys Markets* injunctions wherever the Union presents "colorable claim" to the right. *Standard Food Products Corp. v. Brandenburg*, 436 F.2d 964, 966 (2d Cir. 1970).

[22] Where, as here, no-strike commitments are limited to the pending of disputes in the grievance-arbitration procedure, employees who engage in sympathetic work stoppages are protected by § 7 of the NLRA. *Cary-Hobart Water Corp.*, 210 NLRB No. 87; *Hoff-*

In sum, the difference between the Fifth and the Third and Fourth Circuits comes down to a disagreement as to the meaning of *Boys Markets*, a disagreement of far reaching importance that only this Court can resolve. The issue is a recurrent one vital to the organized economic strength of workingmen who must deal effectively with a multi-plant enterprise or an employer whose workers are organized by craft or department. The contract language in question, arising not from the agreement of the parties but from the operation of federal labor legislation, covers hundreds of thousands of workers in every circuit in the nation. When the conflict pertains to the availability or non-availability of the labor injunction in various courts, as *Boys Markets* teaches, the federal policy of labor law uniformity is "seriously offended." 398 U.S. at 245-246. To return to uniformity in the enforcement of arbitration agreements as well as to restore vitality in the Norris-LaGuardia Act, certiorari should be granted in this case.

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man Beverage Co., 163 NLRB 981. Only the *Amstar* view of *Boys Markets* would preclude federal court restraint of the exercise of such rights.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted

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